EXHIBIT 5

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	:	
	:	Docket No. 01-0614
Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act	:	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S INITIAL COMMENTS

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The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Comments in the above-captioned matter.

I. INTRODUCTION

On June 30, 2001, Public Act 92-22 went into effect. P.A. 92-22, Section 99. Among other things, Public Act 92-22 added new Section 13-801 to the Illinois Public Utilities Act. Id., Section 5.

Section 13-801 states, in relevant part, that it:

> [P]rovides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996 [*47 U.S.C. § 261],* and not preempted by orders of the Federal Communications Commission.
>
> 220 ILCS 5/13-801(a)

Section 13-801 further provides, with respect to its application, as follows:

> A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act [*220 ILCS 5/13-506.1*] shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 [*47 U.S.C. § 251]* and regulations promulgated thereunder.
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> Id.

The Illinois Bell Telephone Company (hereafter "SBC") is subject to alternative regulation under Section 13-506.1 of the Public Utilities Act. See *Order*, Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services Under an Alternative Form of Regulation, ICC Docket Nos. 92-0448/93-0239 (Consol.), October 11, 1994 (hereafter "Alt. Reg. Order"); *Order*, Illinois Bell Telephone Company: Application for review of alternative regulation plan / Illinois Bell Telephone

Company: Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates / Citizens Utility Board and the People of the State of Illinois v. Illinois Bell Telephone Company: Verified Complaint for a Reduction in Illinois Bell Telephone Company's Rates and Other Relief, ICC Docket No. 98-0252/0335; 00-0764 (consol.) (December 30, 2002) (hereafter "Alt Reg Review Order"). Accordingly, under Section 13-801, SBC is subject to such "additional State requirements" as the Commission might prescribe.

In September 2001, SBC[1] filed a tariff in purported compliance with Section 13-801, which the Commission suspended on September 26, 2001. Advice No. 7555. Numerous parties intervened in the subsequent tariff review proceeding; hearings were duly held, and evidence taken and argument heard; and on June 11, 2002, the Commission entered its Order in the proceeding. *Order*, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002) (hereafter "Section 13-801 Order").

On July 11, 2002, SBC sought rehearing of the Commission's Order, which application the Commission denied on July 25, 2002. *See* Notice of Commission Action (July 15, 2002). SBC then filed a timely Notice of Appeal. *See* Notice of Appeal (August 22, 2002). On the same day, SBC filed a *Complaint for Declaratory and Other Relief* in the United States District Court for the Northern District of Illinois seeking federal review of portions of the Commission's Order. *See* Illinois Bell Telephone Company v. Kevin K. Wright, *et al.*, Case No. 02 C 6002 (N.D. Ill.).

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[1] SBC was then doing business as Ameritech Illinois, but has subsequently assumed the business name "SBC Illinois." *See* Notice of Change of Firm Name (August 13, 2003)

During the pendency of the federal court matter, two events took place which bear directly on this proceeding. First, the Federal Communications Commission entered its Triennial Review Order, which promulgated rules significantly altering incumbent local exchange carriers' (hereafter "ILECs") obligations with respect to the offering on an unbundled basis of network elements. See *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 03-36, CC Docket Nos. 96-98, 98-147, 01-338 (August 21, 2003) (hereafter "Triennial Review Order" or "TRO"). An industry association of ILECs, the United States Telecom Association, appealed the Triennial Review Order, and on March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit rendered a decision that vacated several of the rules promulgated by the Triennial Review Order. *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554; 2004 U.S. App. Lexis 3960 (D.C. Cir. 2004) (hereafter "USTA II"). Without going into great detail, the net effect of the Triennial Review Order and the USTA II decision is to render the Commission's Section 13-801 Order at some degree of variance with existing federal requirements.

After the FCC's promulgation of the *Triennial Review Order*, but prior to the rendition of the *USTA II* decision, the Commission moved, in SBC's federal complaint case, to have the matter remanded back to the Commission so it could, to the extent

possible, reconcile its *Section 13-801 Order* with the federal scheme. The District Court granted this relief, finding that:

> [T]he Commission's proposed remand is both consistent with the FCC's mandate for agencies reconsider their decisions in light of the TRO and also assist in winnowing the issues before the court. While it is true that the ICC cannot declare Section 13-801 preempted or unconstitutional, the ICC is not powerless to revise its decision. The ICC is empowered to (1) reconstrue the requirements of Section 13-801, (2) revisit and resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements to the particular facts of this case. In reconstruing Section 13-801, the ICC could reach a different conclusion that may resolve some or all of SBC's claims, or, at least, more accurately define the issues before the court. Because of its unique experience with the state telecommunications regulatory scheme, the ICC is in the best position to evaluate in the first instance whether, and to what extent, the FCC's TRO impacts its decision. The Commissioners' motion for remand is therefore granted.
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> *Minute Order*, Illinois Bell Telephone Company v. Kevin K. Wright, *et al.*, Case No. 02 C 6002 (N.D. Ill. May 17, 2004)

Consistent with this course of action, the Commission entered, on June 23, 2004, an Order reopening this proceeding. See Order Reopening Proceeding (June 23, 2004). There, the Commission found that:

> In view of the changes to federal law made in the TRO (and accompanying rules and regulations), and by the court in USTA II, the Commission finds it necessary to reopen this case to reconsider the Commission's Order in terms of the TRO and the USTA II decision, and to amend its Order where required to comport with the terms of those decisions. The Commission has reason to believe that federal law has changed so as to require this case to be reopened. See 83 Ill. Admin. Code § 200.900. Accordingly, the Commission determines that this case be reopened to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law.
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> Order Reopening Proceeding at 8-9.

The matter was duly set over for status. A number of parties filed petitions to intervene, and a schedule for filing of comments responsive to the issues on reopening

set and subsequently revised so that the parties might offer argument on the effect of the FCC's promulgation of the *UNE Interim Requirements Order*. *See Order and Notice of Proposed Rulemaking*, In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC No. 04-179, WC Docket No. 04-313, CC Docket No. 01-338 (August 20, 2004) ("UNE Interim Requirements Order").

SBC filed its Revised Comments on September 17, 2004, to which these Comments are, in part, responsive.

The Staff notes that SBC has provided, *see* SBC Comments at 3-29, a summary of changes in federal law resulting from the *Triennial Review Order*, *USTA II*, and the *UNE Interim Requirements Order*. The Staff review of this leads it to the conclusion that SBC has generally provided the Commission with a fair recitation of the state of the law. The Staff will, accordingly, not recapitulate this in detail.

II. STATUTE AT ISSUE

Section 13-801 of the Public Utilities Act, entitled "Incumbent local exchange carrier obligations", provides that:

> (a) This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996 [*47 U.S.C. § 261],* and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act [*220 ILCS 5/13-506.1*] shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 [*47 U.S.C. § 251]* and regulations promulgated thereunder.
> An incumbent local exchange carrier shall provide a requesting telecommunications carrier with interconnection, collocation, network elements, and access to operations support systems on just, reasonable, and nondiscriminatory rates, terms, and

conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access. The Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings. As used in this Section, to the extent that interconnection, collocation, or network elements have been deployed for or by the incumbent local exchange carrier or one of its wireline local exchange affiliates in any jurisdiction, it shall be presumed that such is technically feasible in Illinois.

(b) Interconnection.

(1) An incumbent local exchange carrier shall provide for the facilities and equipment of any requesting telecommunications carrier's interconnection with the incumbent local exchange carrier's network on just, reasonable, and nondiscriminatory rates, terms, and conditions:

(A) for the transmission and routing of local exchange, and exchange access telecommunications services;

(B) at any technically feasible point within the incumbent local exchange carrier's network; however, the incumbent local exchange carrier may not require the requesting carrier to interconnect at more than one technically feasible point within a LATA; and

(C) that is at least equal in quality and functionality to that provided by the incumbent local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the incumbent local exchange carrier provides interconnection.

(2) An incumbent local exchange carrier shall make available to any requesting telecommunications carrier, to the extent technically feasible, those services, facilities, or interconnection agreements or arrangements that the incumbent local exchange carrier or any of its incumbent local exchange subsidiaries or affiliates offers in another state under the terms and conditions, but not the stated rates, negotiated pursuant to Section 252 of the federal Telecommunications Act of 1996 [*47 U.S.C. § 252].* Rates shall be established in accordance with the requirements of subsection (g) of this Section. An incumbent local exchange carrier shall also make available to any requesting telecommunications carrier, to the extent technically feasible, and subject to the unbundling provisions of Section 251(d)(2) of the federal Telecommunications Act of 1996 [*47 U.S.C. § 251],* those unbundled network element or interconnection agreements or arrangements that a local exchange carrier affiliate of the incumbent local exchange carrier obtains in another state from the incumbent local exchange carrier in that state, under the terms and conditions, but not the stated rates, obtained through negotiation, or through an arbitration initiated by the affiliate, pursuant to Section 252 of the federal Telecommunications Act of 1996 [*47 U.S.C. § 252].* Rates shall be established in accordance with the requirements of subsection (g) of this Section.

(c) Collocation. An incumbent local exchange carrier shall provide for physical or virtual collocation of any type of equipment for interconnection or access to network

elements at the premises of the incumbent local exchange carrier on just, reasonable, and nondiscriminatory rates, terms, and conditions. The equipment shall include, but is not limited to, optical transmission equipment, multiplexers, remote switching modules, and cross-connects between the facilities or equipment of other collocated carriers. The equipment shall also include microwave transmission facilities on the exterior and interior of the incumbent local exchange carrier's premises used for interconnection to, or for access to network elements of, the incumbent local exchange carrier or a collocated carrier, unless the incumbent local exchange carrier demonstrates to the Commission that it is not practical due to technical reasons or space limitations. An incumbent local exchange carrier shall allow, and provide for, the most reasonably direct and efficient cross-connects, that are consistent with safety and network reliability standards, between the facilities of collocated carriers. An incumbent local exchange carrier shall also allow, and provide for, cross connects between a noncollocated telecommunications carrier's network elements platform, or a noncollocated telecommunications carrier's transport facilities, and the facilities of any collocated carrier, consistent with safety and network reliability standards.

(d) Network elements. The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.

(1) An incumbent local exchange carrier shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service.

(2) An incumbent local exchange carrier shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier.

(3) Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

The incumbent local exchange carrier shall be entitled to recover from the requesting telecommunications carrier any just and reasonable special construction costs incurred in combining such unbundled network elements (i) if such costs are not already included in the established price of providing the network elements, (ii) if the incumbent local exchange carrier charges such costs to its retail telecommunications end users, and (iii) if fully disclosed in advance to the requesting telecommunications carrier. The Commission shall determine whether the incumbent local exchange carrier is entitled to any special

construction costs if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.

(4) A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.

(5) The Commission shall establish maximum time periods for the incumbent local exchange carrier's provision of network elements. The maximum time period shall be no longer than the time period for the incumbent local exchange carrier's provision of comparable retail telecommunications services utilizing those network elements. The Commission may establish a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier if a requesting telecommunications carrier establishes that it shall perform other functions or activities after receipt of the particular network element to provide telecommunications services to end users. The burden of proof for establishing a maximum time period for a particular network element that is shorter than for a comparable retail telecommunications service offered by the incumbent local exchange carrier shall be on the requesting telecommunications carrier. Notwithstanding any other provision of this Article, unless and until the Commission establishes by rule or order a different specific maximum time interval, the maximum time intervals shall not exceed 5 business days for the provision of unbundled loops, both digital and analog, 10 business days for the conditioning of unbundled loops or for existing combinations of network elements for an end user that has existing local exchange telecommunications service, and one business day for the provision of the high frequency portion of the loop (line-sharing) for at least 95% of the requests of each requesting telecommunications carrier for each month.

In measuring the incumbent local exchange carrier's actual performance, the Commission shall ensure that occurrences beyond the control of the incumbent local exchange carrier that adversely affect the incumbent local exchange carrier's performance are excluded when determining actual performance levels. Such occurrences shall be determined by the Commission, but at a minimum must include work stoppage or other labor actions and acts of war. Exclusions shall also be made for performance that is governed by agreements approved by the Commission and containing timeframes for the same or similar measures or for when a requesting telecommunications carrier requests a longer time interval.

(6) When a telecommunications carrier requests a network elements platform referred to in subdivision (d)(4) of this Section, without the need for field work outside of the central office, for an end user that has existing local exchange telecommunications service provided by an incumbent local exchange carrier, or

by another telecommunications carrier through the incumbent local exchange carrier's network elements platform, unless otherwise agreed by the telecommunications carriers, the incumbent local exchange carrier shall provide the requesting telecommunications carrier with the requested network elements platform within 3 business days for at least 95% of the requests for each requesting telecommunications carrier for each month. A requesting telecommunications carrier may order the network elements platform as is for an end user that has such existing local exchange service without changing any of the features previously selected by the end user. The incumbent local exchange carrier shall provide the requested network elements platform without any disruption to the end user's services.

Absent a contrary agreement between the telecommunications carriers entered into after the effective date of this amendatory Act of the 92nd General Assembly [P.A. 92-22], as of 12:01 a.m. on the third business day after placing the order for a network elements platform, the requesting telecommunications carrier shall be the presubscribed primary local exchange carrier for that end user line and shall be entitled to receive, or to direct the disposition of, all revenues for all services utilizing the network elements in the platform, unless it is established that the end user of the existing local exchange service did not authorize the requesting telecommunications carrier to make the request.

(e) Operations support systems. The Commission shall establish minimum standards with just, reasonable, and nondiscriminatory rates, terms, and conditions for the preordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent local exchange carrier's operations support systems provided to other telecommunications carriers.

(f) Resale. An incumbent local exchange carrier shall offer all retail telecommunications services, that the incumbent local exchange carrier provides at retail to subscribers who are not telecommunications carriers, within the LATA, together with each applicable optional feature or functionality, subject to resale at wholesale rates without imposing any unreasonable or discriminatory conditions or limitations. Wholesale rates shall be based on the retail rates charged to end users for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs avoided by the local exchange carrier. The Commission may determine under Article IX of this Act [*220 ILCS 5/9-101* et seq.] that certain noncompetitive services, together with each applicable optional feature or functionality, that are offered to residence customers under different rates, charges, terms, or conditions than to other customers should not be subject to resale under the rates, charges, terms, or conditions available only to residence customers.

(g) Cost based rates. Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates. The immediate implementation and provisioning of interconnection, collocation, network elements, and operations support systems shall not be delayed due to any lack of determination by the Commission as to the cost based rates. When cost based rates have not been established, within 30 days after the filing of a petition for the setting

of interim rates, or after the Commission's own motion, the Commission shall provide for interim rates that shall remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission.

(h) Rural exemption. This Section does not apply to certain rural telephone companies as described in *47 U.S.C. 251*(f).

(i) Schedule of rates. A telecommunications carrier may request the incumbent local exchange carrier to provide a schedule of rates listing each of the rate elements of the incumbent local exchange carrier that pertains to a proposed order identified by the requesting telecommunications carrier for any of the matters covered in this Section. The incumbent local exchange carrier shall deliver the requested schedule of rates to the requesting telecommunications carrier within 2 business days for 95% of the requests for each requesting carrier.

(j) Special access circuits. Other than as provided in subdivision (d)(4) of this Section for the network elements platform described in that subdivision, nothing in this amendatory Act of the 92nd General Assembly [P.A. 92-22] is intended to require or prohibit the substitution of switched or special access services by or with a combination of network elements nor address the Illinois Commerce Commission's jurisdiction or authority in this area.

(k) The Commission shall determine any matters in dispute between the incumbent local exchange carrier and the requesting carrier pursuant to Section 13-515 of this Act [*220 ILCS 5/13-515*].

220 ILCS 5/13-801

III. STATUTORY CONSTRUCTION PRINCIPLES

It is clear from the U.S. District Court's order remanding this matter that the Commission's task on remand is, to the extent possible, to "(1) reconstrue the requirements of Section 13-801, (2) revisit and resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements to the particular facts of this case." Minute Order. The Commission will have to employ established principles of statutory construction to undertake this charge.

SBC argues, as an initial matter, that, with respect to this proceeding, "no rule of statutory construction will be more central to the proper construction of section 13-801

that the rule that 'a statute will be interpreted so as to avoid a construction which would raise doubts as to its validity.' " SBC IB at 32. SBC is wrong. While the principle of statutory construction SBC cites might possibly be utilized in some of the circumstances obtaining in this proceeding, more basic tenets should guide the Commission's inquiry.

It is extraordinarily well settled that the interpretation or construction of statutes is a question of law, to be decided by the court or tribunal. *See, e.g.*, Matsuda v. Cook County Employees and Officers Annuity and Benefit Fund, 178 Ill. 2d 360, 364; 687 N.E. 2d 866 (1997); Branson v. Dept. of Revenue, 168 Ill. 2d 247, 254; 659 N.E. 2d 961 (1995). When interpreting a statute, the *primary objective* is to ascertain and give effect to the intent of the legislature. Bruso v. Alexian Brothers Hospital, 178 Ill. 2d 445, 451-2; 687 N.E. 2d 1014 (1997); Local Union Nos. 15, 51, and 702, International Brotherhood of Electrical Workers v. Ill. Commerce Comm'n, 331 Ill. App. 3d 607, 614, 772 N.E.2d 340, 345-46 (5th Dist. 2002). Legislative intent should be sought primarily from the language of the statute, People v. Beam, 55 Ill. App. 3d 943, 946; 370 N.E. 2d 857 (5th Dist. 1977), since the language of the statute is the best evidence of legislative intent, Bruso at 451, and provides the best means of deciphering it. Matsuda, 178 Ill. 2d at 365. Where the statutory language is clear and unambiguous, the plain language as written must be given effect without reading into it exceptions, limitations or conditions that the legislature did not express and without resorting to other aids of statutory construction. Davis v. Toshiba Machine Co., 186 Ill. 2d 181, 184-85, 710 N.E.2d 399 (1999); Philip v. Daley, 339 Ill. App. 3d 274, 280, 790 N.E.2d 961, 965-66 (2nd Dist. 2003) ("when a statute is unambiguous, it must be applied without resort to further aids of constriction, and there is no need to rely upon an [administrative] agency's

interpretation").[2] Thus, the threshold task for a court or tribunal in construing a statute is to examine the terms of the statute. Toys "R" Us v. Adelman, 215 Ill. App. 3d 561, 568; 574 N.E. 2d 1328 (3rd Dist. 1991).

Moreover, it is clear that a court must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute's application, regardless of its opinion regarding the desirability of the results of the statute's operation. Adelman, 215 Ill. App. 3d at 568; *cf.* Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2nd Dist. 1981) (in determining that application of statute of limitations barring minor's products liability claim was proper, if perhaps harsh, court observed that, where statute is clear, only legitimate role of court is to enforce the statute as enacted by legislature); People *ex rel.* Racing Bd. v. Blackhawk Racing, 78 Ill. App. 3d 260, 397 N.E. 2d 134 (1st Dist. 1979) (court observed that, though the General Assembly could have enacted a statute more effective in accomplishing its purpose than the one it did enact, the court was not permitted to rewrite the statute to remedy this defect).

On the other hand, where the statutory language is *ambiguous* in that it is capable of two or more reasonable interpretations, a court may look to the statute's legislative history to ascertain the legislature's intent or other aids of statutory construction. Local Union, 331 Ill. App. 3d at 614, 772 N.E.2d at 346. Sources of legislative history include the legislative purpose of the statute, the statute's floor and committee debates, the heading or caption of a statutory section at issue, and prior

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[2] A corollary to this rule is that the statute must also be considered within the context of circumstances and conditions that produced its enactment, and the object the legislature sought to obtain. Collins v. Bd. of Trustees of the Firemen's Annuity & Benefit Fund, 155 Ill. 2d 103, 112, 610 N.E.2d 1250 (Ill. 1993).

versions or drafts of the bill that became law.[3] Regardless of whether a statute is ambiguous or not, a court should not construe the statute so that it is rendered absurd, superfluous or meaningless. Matsuda at 366.

Finally, and of some importance to this proceeding is the rule that provides, when terms used in a statute are defined in the statute, those definitions govern, and statutory terms must be construed according to the statutory definitions. Robbins v. Bd. of Trustees of Carbondale Police Pension Fund, 177 Ill. 2d 533, 540; 687 N.E. 2d 39 (1997).

It is Staff's position that the above rules of construction are all the Commission needs to interpret Section 13-801. Staff further believes that the Commission's 13-801 Order "got it right the first time" when it interpreted the section, and based its interpretation primarily upon the statute's plain language and fundamental purpose. SBC, however, would have the Commission ignore the plain language of Section 13-801, and instead preempt the statute wherever it might find that Section 13-801 conflicts with federal law. To accomplish this, SBC invokes an exception to the plain language rule: the absurd result exception. Under this exception, SBC Illinois reinterprets the statute to avoid what it calls the "absurd" result of the Section 13-801 and the 13-801 Order being preempted by a court or the FCC. SBC's mere articulation (and incessant reiteration) of this exception, though, is unpersuasive for several reasons.

First, the cases discussing the absurd result exception are all premised on the presumption that the legislature *did not* intend or foresee the results deriving from a

[3] Id. (legislative purpose); Krohe v. City of Bloomington, 329 Ill. App. 3d 1133, 1136-37, 769 N.E.2d 551, 553-54 (4th Dist. 2002) (floor and committee debates instructive); Maiter v. Chicago Bd. of Education, 82 Ill. 2d 373, 386, 415 N.E.2d 1034, 1039 (Ill. 1980) (committee debates instructive); Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 506, 732 N.E.2d 528, 536 (Ill. 2000) (section heading or caption); Maiter, 82 Ill. 2d at 386-38, 514 N.E.2d at 1040-41 (comparing prior versions of the statute).

plain language interpretation.[4] Section 13-801 itself reveals that no such presumption can be presumed. Section 13-801(a) states in no uncertain *descriptive* terms that "[t]his Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission." 220 ILCS 5/13-801(a). And, "[t]he Commission shall require the incumbent local exchange carrier to provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings." Id.

Similarly, Public Act 92-22, the legislative act that also included Section 13-801, also amended Section 13-514 of the PUA. Section 13-514 prohibits a telecommunications carrier from inhibiting competition. 220 ILCS 5/13-514. Public Act 92-0022 amended Section 13-514 to explicitly state that a carrier violates the section if it, among other things:

> (10) unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings; and
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> *(11) violating the obligations of Section 13-801.*
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> Public Act 92-0022, § 20, eff. June 30, 2001 adding 220 ILCS 5/13-514(10) and 220 ILCS 5/13-514(11) (emphasis added).

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[4] People v. Hanna, 207 Ill. 2d 486, 498-99, 800 N.E.2d 1201, 1207-08 (Ill. 2003) (collecting cases) citing inter alia People ex rel. Cason v. Ring, 41 Ill. 2d 305, 312, 242 N.E.2d 267 (Ill. 1968) (when the literal construction of a statute would lead to consequences *which the legislature could not have contemplated*, the courts are not bound to that construction).

In short, the General Assembly expressly manifested its intent to impose obligations on SBC beyond those set forth in the Federal Act and the FCC rules. Put differently, the only thing absurd is SBC Illinois' suggestion that the General Assembly intended for Section 13-801 to be interpreted in lock step with the Federal Act and the FCC's rules.

Second, even *assuming arguendo* that SBC is correct (which it is not) that the absurd result exception applies, the Commission has no authority to adopt SBC's position.[5] As a creature of statute, the Commission has no general powers except those expressly conferred by *the legislature*. Business and Professional People for the Public Interest v. Ill. Commerce Comm'n, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990) (emphasis added). Moreover, the Illinois Supreme Court has long instructed that an administrative agency can neither limit nor extend the scope of its enabling legislation.[6]

From this, as SBC has correctly noted, but misapplied,[7] "an administrative agency lacks the authority to invalidate a statute on constitutional grounds or to

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[5] In addition, it is Staff's view that even a court would not be able to grant SBC Illinois the relief it seeks based on the legislative history for Public Act 92-0022, the progenitor of Section 13-801. Recently, on September 22, 2004, Judge Philip J. Kardis, sitting in the Circuit Court for the Third Illinois Judicial Circuit, held that the legislature clearly manifested its intent for any provision found unconstitutional or preempted to be severed from the whole. Big Sky Excavating., and other similarly situated v. Illinois Bell, Case No. 03 L 175, at 7-8 (Madison Cty. Cir. Ct., Sept. 22, 2004). As a result, a court would most likely sever those portions of Section 13-801 that were found to be preempted by federal law because while "the judiciary has the responsibility to interpret a statute, [it] does not have the authority to rewrite a statute." Citizens Util. Bd. v. Ill. Commerce Comm'n, 275 Ill. App. 3d 329, 341, 655 N.E.2d 961, 969 (1st Dist. 1995).

[6] Du-Mont Ventilating Co. v. Dept. of Revenue, 73 Ill. 2d 243, 247-48, 383 N.E.2d 197 (Ill. 1978); Peerless Wholesale Liquors, Inc. v. Ill. Liquor Control Bd., 269 Ill. App. 3d 230, 694, N.E.2d 620 (1st Dist. 1998). Cf. Whitman v. American Trucking Ass'n, 531 U.S. 457, 473 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of [its enabling] statute.").

[7] See SBC Illinois Revised Comments, at 31-32 (citing Carpetland for the proposition that "[a]lthough the Commission may not invalidate a statute on constitutional grounds, including the Supremacy Clause, it may employ rules of statutory construction where the statutory text is susceptible of alternative interpretations.").

question its validity." Carpetland U.S.A. v. Ill. Dept. Employment Security, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002). And, the Commission has similarly made this point to clear to SBC Illinois as to the interpretation of Section 13-801 on numerous occasions.[8]

Accordingly, the proper course of conduct for SBC is to make its challenge (as it has clearly done) on the record to preserve the issue for appeal. Carpetland, 201 Ill. 2d at 397, 776 N.E.2d at 192.

The Commission, however, is quite familiar with what it is allowed to do. To the extent that the Commission determines that portions of Section 13-801 may or may not be preempted by the Federal Act or FCC Rules, the Commission must make its concerns known to the General Assembly so that body may decide whether or not to amend the statute. Peerless, 296 Ill. App. 3d at 235, 694 N.E.2d at 623. Also, the Commission must follow and implement the statute's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. Citizens Util. Bd. v. Ill. Commerce Comm'n, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist. 1995).

[8] See, e.g., *13-801 Order*, ¶ 42 ("To the extent that Ameritech's arguments are construed as complaining of the action of the legislature, the Commission concludes that it is without authority to rule on such an issue. Rather, as Staff has pointed out on numerous occasions, in the event that Ameritech believes that the legislature acted in a manner that is preempted by federal law, it has a remedy available to it. Specifically, Ameritech may petition the FCC under Section 253(d) of the FTA, to preempt all or part of Section 13-801, on the grounds that it violates, or is inconsistent with, the federal Act. 47 U.S.C. §253(d). However, Ameritech cannot hope to successfully raise a preemption argument here, in this proceeding. The Illinois Commerce Commission has no authority to declare an Act of the Illinois General Assembly preempted or otherwise unconstitutional. Accordingly, the Commission cannot consider Ameritech's argument that federal law preempts the application of Section 13-801, even if it determined that such arguments had a scintilla of merit.").

The Commission, therefore, should discount much of what SBC has urged upon it, and should determine what latitude it has – under the plain language of Section 13-801 – to amend its Section 13-801 Order.

IV. PREEMPTION PRINCIPLES

The Supremacy Clause, Article VI, cl. 2, of the United States Constitution serves as the basis for Congress' power to preempt state law. Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69 (1986). The single most important factor to consider in any preemption analysis is the intent of Congress. California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987).

The Supreme Court, however, has cautioned lower courts to "start with the assumption that the historic powers of the states [are] not to be superceded by [a] federal act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). In other words, preemption is not to be lightly presumed and any doubt as to congressional purpose should be resolved against preemption because "the state[s] [are] powerless to remove the ill effects of [a] decision, while the national government, which has the ultimate power, remains free to remove the burden." Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

The Supreme Court has recognized three types of preemption: 1) express; 2) occupation of the field; and 3) conflict. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Insofar as neither occupation of the field, nor conflict preemption are explicitly stated in a federal statute's language, then both of these forms come into play as grounds for "implied preemption." Hillborough Cty. Fl. v. Automated Medical Laboratories Inc., 471 U.S. 707, 713 (1985).

Since preemption of state law by federal law is a matter of statutory construction, the first task is to determine whether the federal statute contains an express preemption clause because such a clause "contains the best evidence of Congress' preemptive intent." Sprietsma v. Mercury Marine, 537 U.S. 51, 123 S.Ct. 518, 526 (2002).

Recently, the 7th Circuit stated that since the Federal Act "contains a general anti-preemption clause," Section 601, a court may not interpret it to preempt state law by implication. AT&T Communications of Ill. v. Illinois Bell. Tel. Co., 349 F.3d 402, 410 (7th Cir. 2003), quoting 47 U.S.C. § 601(c), 110 Stat. 56, 143 (1996) (note to 47 U.S.C. § 152) ("This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State, or local law unless expressly so provided in such Act or amendments"). *See* City of Dallas v. FCC, 165 F.3d 341, 349-49 (5th Cir. 1999) (where the court explained that Section 601(c) of the Federal Act "precludes a broad reading of preemptive authority" and provides a "warning[] against implied preemption.").

Accordingly, the Federal Act will only preempt state law if it is determined that state law actually conflicts with express provisions of the Federal Act or those FCC rules that were properly promulgated to implement it. Ind. Bell Tele. Co. v. McCarty, 362 F.3d 378, 392 (7th Cir. 2004) citing and quoting 47 U.S.C. § 261(c), 47 U.S.C. § 251(d)(3), and 47 U.S.C. § 252(e)(3). No preemption of state law by implication is permitted.[9] As the Supreme Court has further explained in a similar context:

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[9] State law may also be preempted where the state law at issue presents an obstacle to the execution of Congress' purpose or frustrates that purpose by interfering with the methods Congress selected to achieve a federal goal even when the state goal is identical to the federal goal. Indiana Bell. Tele. Co. v. Indiana. Util. Regulatory Comm'n, 359 F.3d 493, 497 (7th Cir. 2004).

> After the 1996 Act, Section 152(b) [(the provision of the Federal Act that explicitly deprives the FCC of regulatory authority over intrastate communications)] may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. *Insofar as Congress remained silent, however, § 152(b) continues to function. The [FCC] could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.*
>
> AT&T v. Iowa Util. Bd., 525 U.S. 366, 851 n. 8 (1999).

Moreover, contrary to what SBC will most likely argue, the *TRO*'s statement that the states "amend their rules and to alter their decisions to conform to our rules" has no legal effect. TRO, ¶ 195. As the D.C. Circuit aptly explained in its *USTA II* decision, the FCC's statement "does not constitute final agency action" and is little more than a "general prediction." USTA II, 359 F.3d at 594; 2004 U.S. App. Lexis 3960 at 107-8. While FCC is expressly authorized to preempt state law under Section 253(d) of the Federal Act, and has done so on several occasions,[10] the FCC itself has made clear that "[p]arties seeking preemption must supply [the FCC] with credible and probative evidence that the challenged requirement" is preempted "as a threshold matter." Arkansas Preemption Order, ¶17. As a result, as Staff has noted on numerous occasions, until SBC files a preemption claim with the FCC and the FCC enters an order, the *TRO's* statement has no preemptive effect upon Section 13-801 and the Commission 13-801 Order.

Moreover, in the *Triennial Review Order*, the FCC spoke directly to this issue, stating that:

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[10] *See* 47 U.S.C. § 253(d); In the Matter of American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunication Regulatory Reform Act of 1997 Pursuant to Section 251, 252, and 253 of the Communications Act of 1934, as amended, CC Docket No. 97-100, 14 FCC Rcd 21579, 21587 v. 43, ¶ 16 n 43 (FCC Rel. Dec. 9, 1999) ("*Arkansas Preemption Order*").

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act. We likewise do not agree with those that argue that the states may impose any unbundling framework they deem proper under state law, without regard to the federal regime. These commenters overlook the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act. Their arguments similarly ignore long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy. Under these principles, states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order.
>
> TRO, ¶192 (footnotes omitted)

While the FCC stated that: "It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules[,]", TRO, ¶195, it is clear that the FCC conceived such rules and decision to be those imposing additional unbundling obligations "in the course of a rulemaking or during the review of an interconnection agreement[.]" TRO, ¶194. The FCC found that "state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation[.]" Id. This is in contrast to the Commission order at issue here, undertaken to review a tariff implementing state statutory obligations. It cannot be said that the FCC expected state Commissions, in reconsidering their rules or orders, to invalidate state statutes.

This view is shared by the U.S. District Court, which, in remanding this proceeding to the Commission, found that:

> While it is true that the ICC cannot declare Section 13-801 preempted or unconstitutional, the ICC is not powerless to revise its decision. The ICC is empowered to (1) reconstrue the requirements of Section 13-801, (2) revisit and

resolve any ambiguities in statutory language, and (3) reconsider its application of the statute's requirements to the particular facts of this case. In reconstruing Section 13-801, the ICC could reach a different conclusion that may resolve some or all of SBC's claims, or, at least, more accurately define the issues before the court.

Minute Order

Thus, as a threshold question, if the Commission determines that some provision of Section 13-801 may be preempted either by the express provisions of the Federal Act or the FCC's rules implementing that act, the Commission ought to reconsider its order to determine if the Commission may, within its bounds as a creature of state statute, avoid the possible preemption while still upholding the legislative directive of Section 13-801. To accomplish this task, Staff offers the Commission three guiding principles:

- Section 13-801 is not preempted to the extent that it overlaps and is consistent with the Federal Act or FCC rules;
- Section 13-801, on the other hand, may be preempted to the extent that it overlaps with, is inconsistent with, and substantially prevents the implementation of the Federal Act or FCC rules; and
- Section 13-801 is not preempted to the extent that it is broader than the Federal Act, and the Federal Act is silent as to those areas of intrastate communications as articulated by the Supreme Court above.

In the discussion that follows below, Staff examines the provisions of Section 13-801 and categorizes each provision based on the guiding principles set forth above.

V. CONSTRUCTION OF SECTION 13-801 CONSISTENT WITH FEDERAL LAW

SBC's obligations under Section 251 of TA 96 include offering network elements at rates established pursuant to the particular and unique (to the Federal Act) pricing

standards of Section 252 (d). These Section 251 obligations are set forth generally in Section 251(c)(3):

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates terms and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting curious to combine such elements in order to provide such telecommunications service.
>
> 47 U.S.C. §251(c)(3)

"Section 251" elements must meet the so-called necessary and impair standard of Section 251(d)(2):

> In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether –
>
> > (A) access to such network elements as are appropriate care in nature is necessary; and
> > (B) the failure to provide access to such network elements would you hear the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.
>
> 47 U.S.C. §251(d)(2)

The general pricing standard applicable to network elements that meet the necessary and impair standard is set forth, in turn, in Section 252(d)(1):

> Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --
> (A) shall be--
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and
(B) may include a reasonable profit.

47 U.S.C. §251(d)(1)

This Section 252(d)(1) pricing standard applies only to Section 251 elements. It is the defining characteristic of elements that meet the necessary and impair standard of Section 251. As noted by the FCC in the Triennial Review Order:

> Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 *where impairment is found to exist*.
>
> TRO, ¶656

Pursuant to its authority under TA 96, the FCC established TELRIC as the specific appropriate pricing standard under Section 252(d)(1) for Section 251 elements, 47 C.F.R. §51.505, a standard subsequently approved by the U.S. Supreme Court. Verizon v. FCC, 535 U.S. 467, 475; 122 S. Ct. 1646, 1654; 152 L. Ed. 2d 701, 715; 2002 U.S. Lexis© 3559 (2002). Thus, TELRIC pricing is the crucial and defining attribute of network elements provided pursuant to the requirements of Section 251.

In addition to its Section 251 obligations, SBC must offer network elements pursuant to Section 271 of TA96. The requirements of Section 271(c)(2)(b) (iv), (v), (vi) and (x) are of particular significance:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
> (v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
> (vi) Local switching unbundled from transport, local loop transmission, or other services.

...

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

...

47 U.S.C. §271(c)(2)(B)(iv), (v), (vi), (x)

Significantly (and unlike Section 251(c) obligations), these Section 271 requirements do not turn on any "necessary and impair" standard or test.[11] Section 271(c)(2)(B)(iv)–(vi) and (x) ("Checklist items 4-6 and 10") obligate SBC to provide unbundled access to local loops, transport, switching and certain databases and signaling. These obligations are separate, distinct from and in addition to SBC's obligations under Section 251(c). [12]

The FCC clarified in the *Triennial Review Order* the distinct and independent nature of the requirements of Section 271 Checklist Items 4-6 and 10:

> [T]he requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.
>
> TRO, ¶7

> Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2) *[i.e., the "necessary and impair" standard]*. Rather, the checklist independently imposes unbundling obligations, but simply does so with less rigid accompanying conditions.
>
> TRO, ¶650

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11 Section 13-801 Order, ¶¶ 41-43, 73-77, 82, 222

12 47 U.S.C. §271(c)(2)(B)(iv)–(vi)

The *Triennial Review Order* also explicitly clarified that the fundamental difference between Section 251 and these Section 271 unbundling obligations lies in pricing:

> [W]e conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing.
>
> TRO, ¶659

> Under the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under section 252.
>
> Id., ¶656

This relationship between Section 251 and Section 271 unbundling obligations illuminates the following fundamental principle (and fact): network element unbundling obligations that *differ* from those of Section 251 can coexist and be *wholly consistent* with Section 251 requirements. The practical significance of this is that such *independent* unbundling obligations need not be limited to elements that meet the necessary and impair standard of Section 251. At the same time, however, such independent obligations to unbundle elements that do not meet the necessary and impair standard need not employ Section 251 TELRIC pricing.

As with Section 271 at the federal level, PUA Section 13-801 establishes independent unbundling obligations applicable to SBC (in this instance at the state level). Also as with Section 271 obligations, these independent Section 13-801 unbundling obligations need not be limited to elements that satisfy Section 251 necessary and impair requirements in order to be wholly consistent with Section 251

requirements. Rather, the key limitation is that TELRIC pricing (the essential corollary to the necessary and impair test) cannot be employed if the required consistency between separate and independent unbundling obligations is to be maintained.

In this proceeding, the Commission can ensure the required consistency between independent federal and state unbundling obligations by clarifying that Section 13-801 unbundling obligations do not involve or require TELRIC pricing. Rather, these section 13-801 obligations require pricing consistent with the provisions of Section 13-801(g):

> Interconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates. The immediate implementation and provisioning of interconnection, collocation, network elements, and operations support systems shall not be delayed due to any lack of determination by the Commission as to the cost based rates. When cost based rates have not been established, within 30 days after the filing of a petition for the setting of interim rates, or after the Commission's own motion, the Commission shall provide for interim rates that shall remain in full force and effect until the cost based rate determination is made, or the interim rate is modified, by the Commission.
>
> 220 ILCS 5/13-801(g)

In order to maintain the required consistency between independent unbundling obligations, the cost-based rates of Section 13-801 (as applied to elements that do not meet the federal necessary and impair standard) cannot be TELRIC rates. Rather, a non-TELRIC cost standard must apply to such elements. TELRIC rates continue to apply (whether at the state or federal level) to elements that do satisfy the federal necessary and impair standard.

Proper application under Section 13-801 of non-TELRIC cost-based rates (to elements not satisfying the necessary and impair standard) ensures consistency with

Section 251 of TA 96. However, it remains at least theoretically possible that such Section 13-801 pricing could conflict with federal pricing requirements for the "non-251" elements of Section 271.

The federal pricing standards for Section 271 elements that do not meet the necessary and impair test are set forth in the FCC's TRO:

> [W]e find that the appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202.
>
> TRO, ¶656

The U.S. Circuit Court of Appeals for the District of Columbia Circuit, upheld this conclusion, finding that:

> [W]e see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment.
>
> U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 589; 2004 U.S. App. Lexis 3960 at 93 (D.C. Cir. 2004) ("USTA II").

Accordingly, the non-TELRIC cost-based rates for certain elements provided pursuant to Section 13-801 must not conflict with the "just, reasonable and not unreasonably discriminatory" standards of Sections 201 and 202 of the federal Act. As demonstrated above, the required consistency does not mean, however, that rates for elements provisioned pursuant to Section13-801 must be identical to any rates found by the FCC to satisfy the pricing standards of Section 201 and 202.

There is no reason to believe that cost-based rates required by PUA Section 13-801(g) would be inconsistent with the pricing standards of Section 201 and 202 of the 1996 Act. To the extent Section 13-801 non-TELRIC cost-based pricing is in any respect more "stringent" than Section 201 and 202 pricing requirements (as applied to

elements that do not satisfy the necessary and impair standard), this would be consistent with the authority reserved (and preserved) to the Commission under various provisions of the federal Telecommunications Act.

Finally, in this respect it is useful to note an elemental similarity between the requirements of federal Section 271 and PUA section 13-801. As the FCC observed, Section 271 of TA 96 applies - with good reason - to a select handful of all incumbent local exchange carriers:

> Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.1985 In fact, section 271 places specific requirements on BOCs that were not listed in section 251 [of the Act]. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.
>
> TRO, ¶655

The opening paragraph of Section 13-801 describes - again with good reason - a similarly limited application:

> This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder.
>
> 220 ILCS 5/13-801(a)

In each case, additional and specific requirements placed upon SBC (and other similarly situated carriers) reflect a deliberate and purposeful balancing, or tradeoff, for

benefits that correspondingly and uniquely accrue to SBC (and similarly situated carriers).

VI. CLAIMS OF PREEMPTION AS TO SPECIFIC STATUTORY PROVISIONS AND ELEMENTS

SBC urges the Commission to modify several aspects of its *Section 13-801 Order*. *See* SBC IB at 34 *et seq*. It argues that portions of the Commission's Order decided pursuant to Section 13-801(d)(3), requiring SBC to offer unbundled local switching for enterprise customers,[13] to combine certain elements, and to permit enhanced extended loops ("EELs") to terminate other than in a collocation arrangement, must be conformed to existing federal limitations. Id. at 34-38, 52.

SBC further contends that the Commission's decision with respect to SBC's obligation to provide a network elements platform, pursuant to Section 13-801(d)(4) is inconsistent with federal law and must be revised. SBC IB at 38-42, 52-3. SBC next, and in a related contention, argues that the Commission's decision to require SBC access to "splitters" on an unbundled basis is incorrect in the light of federal law, and must be revised. Id. at 42-43, 53. SBC further contends that the Commission's decision to include the SBC terminating switch as part of a Section 13-801(d)(4) network elements platform in toll call situations – thereby preventing SBC from assessing terminating access charges – must also be revised. Id. at 43-4, 53. SBC also objects to the Commission's decision to permit purchasers of a Section 13-801(d)(4) network elements platform to resell transport to long distance carriers for the purpose of

[13] SBC further contends that the same analysis should apply to a number of service/elements associated with unbundled local switching, including shared transport, directory assistance, operator services, signaling, and the LIBD database. *See* SBC IB at 51.

providing intraLATA toll service; SBC contends that this requirement cannot stand. Id. at 44-5, 53.

SBC next argues that the Commission's decision to dispense with a "necessary" requirement for collocation of equipment is infirm in the light of federal law. SBC IB at 45-8, 54. Finally, it argues that the Commission's requirement that SBC file tariffs with respect to its Section 13-801 obligations cannot be reconciled with federal law. Id. at 48-53.

As noted above, however, SBC's contentions must be, to a significant degree, discounted. The Commission is not merely engaged in reinterpreting its *Section 13-801 Order* here; rather, it is attempting to determine whether and to what extent the plain language of Section 13-801 *prevents* it from reinterpreting its *Section 13-801 Order*.

The Commission should be guided to a significant degree by its own findings in the *Section 13-801 Order*. There it determined that:

> Further, to the extent that Ameritech has argued here, as well as in other areas, that various Sections of the Federal Act require State Commissions to act in a certain way when dealing with issues under federal law, Ameritech has pointed us to nothing in the Telecommunications Act of 1996 that directs itself to state legislatures. To the extent that Ameritech's arguments are construed as complaining of the action of the legislature, the Commission concludes that it is without authority to rule on such an issue. Rather, as Staff has pointed out on numerous occasions, in the event that Ameritech believes that the legislature acted in a manner that is preempted by federal law, it has a remedy available to it. Specifically, Ameritech may petition the FCC under Section 253(d) of the FTA, to preempt all or part of Section 13-801, on the grounds that it violates, or is inconsistent with, the federal Act. 47 USC 253(d). However, Ameritech cannot hope to successfully raise a preemption argument here, in this proceeding. The Illinois Commerce Commission has no authority to declare an Act of the Illinois General Assembly preempted or otherwise unconstitutional. Accordingly, the Commission cannot consider Ameritech's argument that federal law preempts the application of Section 13-801, even if it determined that such arguments had a scintilla of merit.

> Our conclusion is that the legislature intended that the situation in Illinois be different than that required by the FCC and that we have no choice but to enforce and give effect to that decision.
>
> Section 13-801 Order, ¶¶42-43

The Commission's approach was correct. If Section 13-801 provides clear direction as to legislative intent, the Commission's job is done – as, indeed, the U.S. District Court recognized. The Staff will demonstrate where such guidance is present, or is lacking.

A. Unbundled Local Switching to Enterprise Customers

Section 13-801(d) of the Public Utilities Act, entitled "Network Elements", provides that:

> The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.
> 220 ILCS 5/13-801(d)
>
> Section 13-801(d)(3) provides that:
> Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.
> 220 ILCS 5/13-801(d)(3)

Of considerable significance to this discussion is the fact that the General Assembly has defined "network elements" as follows:

> "Network element" means a facility or equipment used in the provision of a telecommunications service. The term also includes features, functions, and capabilities that are provided by means of the facility or equipment, including, but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.
> 220 ILCS 5/13-216

In its *Section 13-801 Order*, the Commission made it quite clear that: "[t]here is simply no indication that the legislature, in enacting Section 13-801(d)(3) or in reclassifying certain business lines as competitive, intended that the UNE combining requirement would depend upon the type of end-use customer served by a requesting carrier." Section 13-801 Order, ¶165.

This is borne out by another portion of the *Section 13-801 Order*, in Commission addressed an issue similar to SBC's argument that the Commission should not require it to provide enterprise switching. Specifically, SBC's contention there that it ought not be required to offer unbundled access to switching to CLECs for the purpose of serving customers with four or more lines in those areas of the largest 50 MSAs were ILECs make EELs available. Section 13-801 Order, ¶434. Under the *federal* standards existing at the time, SBC was correct in this assertion. *See Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, ¶¶253, 278, 285, 288, 290, 298, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC No. 99-238; CC Docket No. 96-98; 15 FCC Rcd 3696; 1999 FCC Lexis 5663; 18 Comm. Reg. (P & F) 888 (November 5, 1999)(hereafter "UNE Remand Order") (ILECs need not unbundled local switching for CLECs serving customers with four or more lines in density zone 1 of the largest 50 metropolitan statistical areas, provided that the ILECs offer nondiscriminatory access to EELs).

The Commission, however, rejected this argument on the basis that the plain text of Section 13-801 did not countenance or permit such an exception, stating that:

> The final matter relates to [SBC's] "switch carve-out' reservation of rights, under which it seeks to retain the ability to no longer offer ULS to requesting carriers providing services to end users having in excess of four voice grade lines. [SBC] argues that any contrary interpretation would violate section 261(c) of the federal act, which requires state commissions to establish access and interconnection obligations that are consistent with the requirements of Section 251. [SBC] asserts that this result must obtain here due to the fact that the FCC, in interpreting section 251, concluded that because local switching was competitive in [SBC's] service territory and [SBC] had committed to provisioning EELs, Ameritech should be granted the federal right to no longer offer ULS to service end users with four or more lines, after October 10, 2002.
>
> Again, based upon our review of the statute, there is simply no reason to conclude that the legislature intended that [SBC] be allowed to remove the opportunity to purchase a network elements platform at any time or for any reason. The language is straightforward, a telecommunications carrier may use a network elements platform to provide service to an end user, without qualification as to the number of lines the end user has in service. The statute is also clear that the obligations imposed are additional state requirements contemplated by but not inconsistent with Section 261(c) of the Federal Act, and not preempted by orders of the FCC. 220 ILCS 13-801(a). Given the legislature's pronouncement that the legislation was passed in full view of Section 261(c) and relevant FCC orders, and the fact that it has no "switch carve out" exception, the Commission concludes that none was intended and that none was needed to pass muster under Section 261(c). Accordingly, [SBC] will be required to remove this reservation of rights from its tariff.
>
> Section 13-801 Order, ¶¶455-56

This conclusion remains the only possible one to be drawn from the statute. The plain language of Section 13-801 does not make any mention of business customers or business service, nor does it exempt ILECs from providing network elements to CLECs for the purpose of serving such customers. Since the General Assembly was perfectly aware of the difference between business service and business customers on the one hand, and residential customers on the other – *indeed, it enacted a provision*

recognizing such a distinction in Public Act 92-22, the same enactment that created Section 13-801 – the lack of any such distinction in Section 13-801 must have been completely intentional. *See* 220 ILCS 5/13-502.5 (service to business end users classified as competitive).

Moreover, to the extent that resort to extrinsic aids to construction are necessary – a point the Staff does not concede – these also demonstrate that SBC's proposal cannot be accepted. The legislative history of Public Act 92-22 demonstrates that the General Assembly did not intend a mass market and enterprise market distinction. Public Act 92-22 derived from Senate Amendments #3 and #4 to House Bill 2900 of the 92nd General Assembly. Senate Amendments #3 and #4 were adopted by the Senate on May 30, 2001 and became the perfected version of HB 2900, later passed by the House and signed by the Governor.

However, prior to enactment, on May 25, 2001, Representative Steve Davis filed House Amendment #1 to Senate Bill 10. HA #1 to SB 10 was identical to House Bill 2900, except for certain modifications to what are now Sections 13-502.5 and 13-801 of the Public Utilities Act. Among other things, HA #1, Section 13-801(d)(3) would have read as follows:

> Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself **to provide local exchange services to residence and small business customers (customers with 4 or fewer access 24 lines),** including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700.

In other words, the General Assembly considered, and rejected such a provision.

Thus, there is simply no way to read the statute as SBC suggests. The Commission cannot and should not read the term "business end users" into the statute where it does not exist. SBC's proposal must therefore be rejected.

This being the case, SBC's argument that it should be exempted from providing shared transport, directory assistance, operator services, signaling, and the LIBD database, must also be rejected.

In any event, there is no inconsistency between the Section 13-801 requirement that SBC provide the switching element to enterprise customers and federal law and regulations, provided the Commission does not require TELRIC pricing for this network element. The federal Section 271 requirement that the switching element be provided to enterprise customers at non-TELRIC rates is wholly consistent with the FCC finding that enterprise switching is not a "Section 251" element. The same applies to the "enterprise switching" requirement of Section 13-801.

B. Combination of "Ordinarily Combined" UNEs

The Staff observes that the *USTA II* decision vacated the rules regarding impairment as to transport and enterprise switching. USTA II, 359 F.3d at 566, 594-95; 2004 U.S. App. Lexis at 23, 108-110. The FCC took no appeal from this decision, and has yet to promulgate final rules on remand.

Several things can, however, be stated with some degree of confidence. First, in its *Triennial Review Order*, the FCC stated that:

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain

> no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3).
>
> TRO, ¶655, n.1989

Accordingly, under the federal scheme, a BOC need only combine those elements that it is required to offer on an unbundled basis pursuant to Section 251(c)(3), and need not combine them with other elements. Accordingly, the Commission's task is to determine whether and to what extent existing federal law can be reconciled with Section 13-801(d)(3).

As noted above, Section 13-801(d)(3) requires SBC to combine "any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A)[.]" 220 ILCS 5/13-801(d)(3). The Commission previously interpreted Section 13-801(d)(3) as follows:

> [T]he Illinois Legislature [has] established a different scheme, one which [SBC] finds uncomfortable, but one we have been charged with enforcing. To that end, we conclude that we have been charged by the legislature with imposing a broad based UNE combination requirement upon [SBC]. [SBC's] proposal is not broad based, and must be rejected.
>
> Section 13-801 Order, ¶165

The use of the term "unbundled network elements" in Section 13-801(d)(3) is, contrary to SBC's assertions, not dispositive. In its *Section 13-801 Order* the Commission determined that Section 13-801 contained no requirement that the Commission conduct a "necessary / impair" analysis, finding that:

> Finally, to the extent that [SBC] has argued that Section 251(d)(2) of the federal act requires a state commission to engage in a necessary and impair analysis when dealing with any issue concerning unbundling, the Commission rests on its prior conclusion in the immediately preceding Section of this Order, that this argument is, in reality, an attack on the constitutionality of Section 13-801 and

that the Commission is not the appropriate body to whom to make these arguments.

Section 13-801 Order, ¶82.

The Commission's "prior conclusion" referred to above was that, where the word "necessary" did not appear in Section 13-801, it could not be read in by implication. Section 13-801 Order, ¶¶41-43, 78. Indeed, it consigned "the concept of unbundling in the platform context to the scrap heap of time." Id., ¶75. Accordingly, the Commission cannot, without abandoning its previous reasoning – which was based upon the plain statutory language – read a "necessary" requirement into Section 13-801(d)(3).

This being the case, the term "unbundled network element" should be read to mean something other than what it means in the federal scheme: i.e., "network element", as defined in state law, with the word "unbundled" describing the fact that the elements in question are simply not initially combined with other elements. This is consistent with the Commission's decision not to read "necessary" into the statute. Accordingly, there is no compelling basis in the statutory language to alter SBC's unbundling obligation.

The Staff realizes – and the Commission should as well – that the decision it recommends here is arguably inconsistent with the federal scheme. However, the Staff cannot recommend that the Commission depart from the plain statutory language. The Staff notes that the U.S. District Court accepted that this might be a possibility when it remanded the statute.

C. Termination of Enhanced Extended Loops ("EELs")

The Commission found, in the *Section 13-801 Order*, that:

> The Commission agrees with Staff, Joint CLECs and Golbalcom that there is nothing in section 13-801 that remotely suggests a collocation requirement for the termination of EELs. First, we agree with Staff that section 13-801(d)(3) speaks only to Ameritech's obligation to combine the I2A combinations but is silent in respect to the restrictions and conditions that were included in the document, which are only now being reviewed by the Commission. **Further, the FCC has specifically recognized in the definition of dedicated transport (which is one of the UNEs that make up an EEL) that it may terminate in places other than a collocation arrangement. Nothing in the newly enacted legislation addresses this and we have been offered no reason to depart from the FCC's definition and decline to do so here.** In arriving at this conclusion we specifically reject Ameritech's self-serving rationale for the legislature's requirement that it provide EELs. There is simply no indication that the legislature expressed any interest in limiting the use to which EELs might be put "to enable a CLEC with a single collocation arrangement to increase the number of potential customers it can serve by using the EEL to transport unbundled local loop from distant central offices within the LATA back to its collocation arrangement." In fact such a limitation would contradict the policy underpinnings of the new legislation as expressed in section 13-801(a): the 13-801(a) requirement that Ameritech provide interconnection, collocation, and network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings. We adopt the language of the Joint CLECs proposed tariff.
>
> Section 13-801 Order, ¶236 (emphasis added)

It is clear from the forgoing that the Commission did not base its conclusions on the plain language of the statute. Rather, the Commission found "nothing in section 13-801 that remotely suggests a collocation requirement for the termination of EELs", Id., or, for that matter anything that prohibited such a requirement. Significantly, the Commission based its decision in part upon existing FCC rules, stating that:

> Further, the FCC has specifically recognized in the definition of dedicated transport (which is one of the UNEs that make up an EEL) that it may terminate in places other than a collocation arrangement. Nothing in the newly enacted legislation addresses this and we have been offered no reason to depart from the FCC's definition and decline to do so here.
>
> Id.

Thus, to the extent that (a) Section 13-801 does not impose or prohibit a collocation requirement; and (b) the Commission clearly based its decision on existing FCC rules, the Staff sees no reason why the Commission cannot reconsider this decision, in a manner consistent with FCC rules, as SBC suggests.

As SBC correctly observes, *see* SBC IB at 36, the FCC has spoken to this issue in the period since the Commission adopted its *Section 13-801 Order*. Specifically, in the *Triennial Review Order*, the FCC found, with respect to collocation of EELs, as follows:

> [W]e find [that] ... each [EEL] circuit must terminate into a collocation governed by section 251(c)(6) at an incumbent LEC central office within the same LATA as the customer premises; each circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL for the meaningful exchange of local traffic, and for every 24 DS1 EELs or the equivalent, the requesting carrier must maintain at least one active DS1 local service interconnection trunk; and each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic.
>
> TRO, ¶597

Thus, the FCC has determined that EELs must terminate in collocation arrangements. It is clear that the Commission may, and in this case should, amend the Section 13-801 Order to provide that SBC need not permit CLECs to terminate EELs in locations other than collocation arrangements.

D. Provision of Network Elements Platform

As noted above, SBC's obligation to combine elements under Section 13-801(d)(3) is, by the terms of the statute, not limited to those elements that must be unbundled pursuant to an impairment determination made under Section 251(d)(2)(B),

but rather to those elements that it combines for itself, including but not limited to those set forth in the Draft I2A. 220 ILCS 5/13-801(d)(3). This bears upon the platform issue, inasmuch as Section 13-801(d)(4) states that:

> A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.
>
> 220 ILCS 5/13-801(d)(4)

As the Commission noted in its *Section 13-801 Order*: "[T]he legislature, in establishing the right of requesting carriers to utilize a network elements platform consisting of combined network elements of [SBC], demonstrated its intent that the Commission's actions had not gone far enough in providing requesting carriers with the elements they required to provide the services they wanted to provide." Section 13-801 Order, ¶452. As the Commission further noted, requesting carriers are permitted to provide telecommunications service using any network elements. Id., ¶77. In so finding, the Commission discarded the concept of unbundling "onto the scrap heap of time." Id., 76. Thus, Section 13-801(d)(4) permits telecommunications carriers to "use a network elements platform" – with "network elements" as defined in Section 13-216 – "consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service[.]" 220 ILCS 5/13-801(d)(4). Indeed, such elements must be combined by SBC.

The Staff – again – notes that such a finding may prove difficult to reconcile with federal law, but is nonetheless dictated by the plain terms of the statute.

E. Unbundled Access to Splitters

Section 13-801(a) of the Public Utilities Act provides, in relevant part, that:

> An incumbent local exchange carrier shall provide a requesting telecommunications carrier with interconnection, collocation, network elements, and access to operations support systems on just, reasonable, and nondiscriminatory rates, terms, and conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access.
>
> 220 ILCS 5/13-801(a)

Likewise, Section 13-801(d)(4) states that:

> A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.
>
> 220 ILCS 5/13-801(d)(4)

The Commission, in determining that SBC was required to provide a splitter, referred to the Section 13-216 definition of network element, and reasoned as follows:

> Based upon our review of the current statutes, we conclude that a splitter is a network element because it is equipment used in the provisioning of the transmission of information by electromagnetic or light means. Because the splitter falls squarely within the definition of a network element and section 13-801(d)(4) forces the provision of a platform consisting of, apparently any and all, "combined network elements," we conclude that the legislature must have intended that splitters be provided to any requesting carrier that seeks to provide service through the purchase of a platform, without regard to whether the carrier wishes to provide voice grade or high speed service. We further conclude that the legislature has rejected the Commission's previous definition of the "platform" as what has come to be known as the "UNE-P," which consists of an unbundled loop, switching functionality and shared transport. In our view, if the legislature had intended us to retain the status quo, it would have defined the platform as we

> have previously defined the UNE-P. The fact that it did not indicates to us its displeasure with the definition we previously adopted and the pace of competitive entry in the various markets for telephony that has resulted.
>
> Section 13-801 Order, ¶77

This is sound reasoning, provided always that the splitter is being used to provide a "local, local toll, and intraLATA toll, and exchange access telecommunications service[.]" 220 ILCS 5/13-801(d)(4). However, this may not be an accurate characterization of what a splitter actually does.

As the *Section 13-801 Order* observes, a splitter is a device that "separates the voice signal from the high speed signal at a point outside the customer's premises." Section 13-801 Order, ¶74. The purpose of this is to "provide end user customers with both voice grade and high speed service over a copper loop[.]" Id. In other words, the splitter essentially is a device used to enable the provisioning of high-speed Internet traffic simultaneously with - and over the same loop facility as- voice traffic.

Internet traffic has a number of characteristics that distinguish it from other types of traffic that rides the public switched network. One of the most significant is the fact that the FCC has found it to be something other than a "telecommunications service." *Order on Remand and Report and Order*, ¶44, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Intercarrier Compensation for ISP-Bound Traffic, FCC No. 01-131, CC Docket No. 96-98; 99-68 (April 27, 2001)("ISP Remand Order"). There, the FCC found that:

> We conclude that Congress's reference to "information access" in section 251(g) was intended to incorporate the meaning of the phrase "information access" as used in the AT&T Consent Decree. The ISP-bound traffic at issue here falls within that category because it is traffic destined for an information service provider. Under the consent decree, "information access" was purchased by "information service providers" and was defined as "the provision of specialized

> exchange telecommunications services . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services." We conclude that this definition of "information access" was meant to include all access traffic that was routed by a LEC "to or from" providers of information services, of which ISPs are a subset. The record in this proceeding also supports our interpretation. When Congress passed the 1996 Act, it adopted new terminology. The term "information access" is not, therefore, part of the new statutory framework. Because the legacy term "information access" in section 251(g) encompasses ISP-bound traffic, however, this traffic is excepted from the scope of the "telecommunications" subject to reciprocal compensation under section 251(b)(5).
>
> Id.

Moreover, the FCC determined – as it had done in the past – that internet-bound traffic is *inter*state, rather than *intra*state in nature. Id., ¶45.

It appears to the Staff that the splitter is therefore a device used to provide something other than a "local, local toll, and intraLATA toll, and exchange access telecommunications service telecommunications service", thereby removing it from the aegis of Section 13-801, which, as noted above, requires ILECs to unbundle network elements for the purpose of providing such services, but not for others.

It might be argued that the definition of "telecommunications service" in the Public Utilities Act, 220 ILCS 5/13-203, which is arguably more expansive than the federal definition, 47 U.S.C. §153(46); indeed, the Staff would in almost all circumstances be the party advancing this position. Here, however, the federal definition is appropriate in light of the interstate nature of the traffic. Accordingly, the Commission should amends its Section 13-801 Order to relieve SBC of the obligation to provide splitters.

Despite the foregoing, however, if the Commission perceives a compelling reason to apply the state (rather than federal) definition of network elements to splitters, it may do so and still maintain consistency between state and federal requirements. SBC can be required to provide access to splitters, where physically available, pursuant to Section 13-801 at non-TELRIC rates and absent any other requirement uniquely applicable to "Section 251" elements (notably, the "bundling" obligation of Section 251). For the reasons given above, Staff sees no need for the Commission to require unbundled access to splitters in SBC's tariff.

F. Terminating Access

In its *Section 13-801 Order*, the Commission found that:

> [SBC] should not be allowed to charge terminating access to a CLEC that utilizes the ULS-ST portion of the network platform to provide intra-LATA toll calling. [SBC's] argument that it has always done so, overlooks the fact that the legislature has now changed [SBC's] way of doing business in numerous ways. In a previous section of this order, we concluded that the legislature, in establishing the right of requesting carriers to utilize a network elements platform consisting of combined network elements of [SBC], demonstrated its intent that the Commission's actions had not gone far enough in providing requesting carriers with the elements they required to provide the services they wanted to provide. We agree with the Joint CLECs that Ameritech has resisted providing carriers with the ability to provide intraLATA toll and that the legislature intended that this resistance end, post haste. To accept Ameritech's argument that it should continue to charge terminating access in light of the legislative enactment, would be to ignore the will of the legislature, which we cannot and will not do.
>
> We also reject [SBC's] argument that terminating switching cannot be provided because it has not been required as an unbundled network element. As we noted previously, our view of the new legislation is that it has created a sea change in the manner in which requesting carriers are to be provided access to [SBC's] network architecture. The legislature did not speak to "unbundled elements" or the UNE-P in Section 13-801(d)(4). Rather, it required access to a "network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end . . . interexchange, . . . intraLATA toll and exchange access service . . . " 220 ILCS 13-801(d)(4) Again,

> as noted previously, network elements are defined to include equipment used in the provision of a telecommunications service. The terminating switching function of ULS-ST fits this definition and requesting carriers must be given access to it as a network element, to complete intraLATA toll calls.
>
> Section 13-801 Order, ¶452-53

It is clear from the forgoing that the Commission reached this conclusion based upon its construction of the plain language of Sections 13-216 and 13-801(d)(4). Section 13-801(d)(4) provides that:

> A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.
>
> 220 ILCS 5/13-801(d)(4)

Section 13-216 provides that:

> "Network element" means a facility or equipment used in the provision of a telecommunications service. The term also includes features, functions, and capabilities that are provided by means of the facility or equipment, including, but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.
>
> 220 ILCS 5/13-216

It is clear that the only conclusion that the Commission could reasonably reach from these provisions is that a CLEC has a right to (a) provide IntraLATA service, (b) on an end-to-end basis, (c) through the use of nothing but network elements. This being the case, it is impossible to see how SBC can be permitted to charge terminating access.

Staff notes that this is a situation where the outcome might well be considered somewhat harsh or unreasonable. This, however, is not an issue for the Commission to resolve; as noted above, a harsh result is not a reason to invalidate a statute. Thornton v. Mono Mfg. Co., 99 Ill. App. 3d 722, 425 N.E. 2d 522 (2nd Dist. 1981). However, to the extent that the Commission determines that SBC need no longer provide a network elements platform, this requirement would become moot.

G. Resale of Transport By Platform Purchasers

In its *Section 13-801 Order*, the Commission found that:

> In terms of allowing a CLEC to "resell" the intraLATA toll portion of the network elements platform to an IXC, we find no basis upon which to conclude that such an arrangement is proscribed by the "end user/payphone provider" limitation of Section 13-801(d)(4). Section 13-801(d)(4) provides simply that requesting carriers may use a network elements platform to provide a number of telecommunication services, including local and interexchange. The issue before the Commission is whether the statute may be read as limiting to [SBC], the opportunity to sell the portion of a platform utilized to provide interexchange service. No such limitation appears on the face of the statute. It speaks solely to a telecommunication carrier's use of a network elements platform to provide interexchange services, not the entity from whom a platform must be purchased. In this case, an IXC (unquestionably a telecommunications carrier) would be purchasing a portion of a platform to provide interexchange services from a CLEC that had purchased an entire platform. The interexchange services would be provided to the CLEC's local service end user, bringing the arrangement within the purview of the statute. Ameritech asserts that in such a case it must be the seller of the portion of the platform that allows such services to be provided and must stand in privity of contract with the IXC. There is simply no such limitation in the Act. Further, given our prior conclusion that the legislature intended its action to fundamentally change the telecommunications landscape in Illinois, we are unwilling to read such a limitation into the Act. Accordingly, the CLECs proposal to resell intraLATA toll to IXCs is allowed.
>
> Section 13-801 Order, ¶454

In other words the Commission based its decision on the plain language of Section 13-801(d)(4). That section permits:

> A telecommunications carrier [to] use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new ... telecommunications services within the LATA ...[.]
>
> 220 ILCS 5/13-801(d)(4)

The telecommunications carrier is permitted to "use a network elements platform consisting solely of combined network elements ***of*** the incumbent local exchange carrier[,]"; no mention is made of the network elements necessarily being purchased ***from*** the ILEC. Accordingly, the Commission's original construction of the provision was correct; resale must be permitted under the clear statutory language. To the extent that the Commission determines that the platform need no longer be provided, of course, such a finding would be unnecessary.

H. "Necessary" Requirement For Collocation of Equipment

In its *Section 13-801 Order*, the Commission found that:

> In our view the legislature has determined that, in Illinois, it is appropriate that Ameritech be required to bear additional obligations as the price to pay for being the only ILEC being regulated under an alternative form of regulation. One of the additional requirements includes the physical or virtual collocation of any type of equipment for interconnection or access to network elements at the premises of the incumbent local exchange carrier on just, reasonable and nondiscriminatory rates. The statute does not speak to "necessary" equipment or otherwise limit by modification the obligation in any way, other than by providing a non-exclusive list of the pieces of equipment that might reasonably be placed in a collocation arrangement. Contrary to Ameritech's assertion that the inclusion of a modifier between "any" and "equipment" would have rendered the statute unambiguous, our experience suggests otherwise. The inclusion of fact driven modifiers (in this case "necessary") is simply an invitation for litigants to parse words and haggle over meanings. Here, the legislature has spoken distinctly, succinctly and unambiguously; "any equipment" means just that.
>
> Section 13-801 Order, ¶41

Again, it is abundantly clear that the Commission, in deciding this issue, rendered its decision based upon the plain language of the statute. Section 13-801(c), governing collocation, and entitled as such, provides in relevant part that:

> An incumbent local exchange carrier shall provide for physical or virtual collocation of any type of equipment for interconnection or access to network elements at the premises of the incumbent local exchange carrier on just, reasonable, and nondiscriminatory rates, terms, and conditions. The equipment shall include, but is not limited to, optical transmission equipment, multiplexers, remote switching modules, and cross-connects between the facilities or equipment of other collocated carriers. The equipment shall also include microwave transmission facilities on the exterior and interior of the incumbent local exchange carrier's premises used for interconnection to, or for access to network elements of, the incumbent local exchange carrier or a collocated carrier, unless the incumbent local exchange carrier demonstrates to the Commission that it is not practical due to technical reasons or space limitations. An incumbent local exchange carrier shall allow, and provide for, the most reasonably direct and efficient cross-connects, that are consistent with safety and network reliability standards, between the facilities of collocated carriers. An incumbent local exchange carrier shall also allow, and provide for, cross connects between a noncollocated telecommunications carrier's network elements platform, or a noncollocated telecommunications carrier's transport facilities, and the facilities of any collocated carrier, consistent with safety and network reliability standards.
>
> 220 ILCS 5/13-801(c)

In other words, the Commission declined to impose a "necessary" requirement because none could be found in the plain language of the statute, which permits collocation of "*any* type of equipment for interconnection or access to network elements[.]" Id. Moreover, such equipment "shall include, but is not limited to, optical transmission equipment, multiplexers, remote switching modules, and cross-connects between the facilities or equipment of other collocated carriers." Id. It is clear from the forgoing that the General Assembly did not intend to, and specifically did not, limit collocation of equipment to that satisfying a "necessary" test. The Commission should not attempt to impose such a limitation here.

I. Tariffing Requirements

SBC again urges the Commission to preempt state statutes, in this case Sections 9-201 and 13-503, which require the filing of tariffs for all telecommunications services. For the reasons set forth in detail elsewhere, the Commission should decline to do so. SBC urges the Commission to decline to enforce valid state statutes because of the alleged preemptive effect of a federal decision. This the Commission, as the agency specifically charged with enforcement of those statutes, cannot and should not do.

VII. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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